80-615

No. .....

Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1980

SAM BESASE, SAM RAPPAPORT and TED MAISON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. When the Internal Revenue Service fails to prove in Trial Court that a partnership exists, can the Appellate Court find an alleged partner liable, as an individual, for excise taxes assessed against the partnership?

2. May an Appellate Court re-evaluate evidence presented in Trial Court to find an individual liable for excise taxes assessed against a partnership which was proved non-existent in the Trial Court?

LIST OF ALL PARTIES

The petitioners are: Sam Besase, Sam Rappaport, Ted Maison who, of the six defendant-appellees, were the three held liable for the excise taxes as individual operators, the other three defendant-appellees having been found not liable.

The defendants in the Court below were John Besase, George Besase, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison. The other defendants are alleged transferees and trial of their case was continued subject to final determination of the principals. The Sixth Circuit Court of Appeals sustained the Trial Court in finding that John Besase, George Besase and Angelo Perna were not liable for excise taxes which arose from an alleged six-man partnership.

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OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Northern District of Ohio, Western Division, is reproduced in the Appendix at page A13. The order of the District Court is reproduced in the Appendix at page A38. The opinion of the United States Court of Appeals for the 6th Circuit is reproduced in the Appendix at page A1. The order of the United States Court of Appeals for the 6th Circuit, denying petition for rehearing, dated July 25, 1980, is reproduced in the Appendix at page A39.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1980, and issued as a mandate on August 19, 1980. Petition for rehearing was denied on July 25, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

This case involves the 5th Amendment of the Constitution of the United States and the Internal Revenue Code of 1954 (26 U.S.C.) Section 4401 (Appendix p. A40).

STATEMENT OF THE CASE

This suit was brought by the United States of America (hereinafter Government) to reduce to judgment certain wagering-excise tax assessments and fraud penalties levied against the defendant taxpayers. Plaintiff commenced the action pursuant to the provisions of Sections 7401-7403 of the Internal Revenue Code of 1954, 26 U.S.C. Jurisdiction is alleged under 28 U.S.C. Sections 1340 and 1345, and 26 U.S.C. Sections 7402 and 7403.

The original assessment against the partnership was in the amount of $1,067,889.74. The Internal Revenue Service made a similar assessment against six of these defendants on the theory that each was a member of a six-way partnership and therefore each was liable for the full amount of partnership assessment. Thus, the total assessments against the six was in the amount of $6,407,338.44.

Subsequent to these assessments, the defendants filed claims in abatement requesting abatement of the full assessment. These claims were denied by the Internal Revenue Service, but, on August 6, 1969, the Internal Revenue Service advised that the assessments against the alleged members were being abated in the amount of $888,-908.11 for each of the members. This resulted in an adjusted assessment against each alleged member in the amount of $117,981.63. The statement of the Internal

Revenue Service in its letter of August 6, 1969, reads in part as follows:

"Each of the *members* of the above partnership filed abatement claims on July 17, 1968. Each of the six claims is for $1,067,889.74. The *members* have been assessed individually for the total tax attributable to all of the *members*. This claim is being allowed to the extent that we attribute a pro rata portion of the total tax to each of the *members*. The abatement is distributed as follows:

	Amt. Assessed	Adjusted Ass'm't.	Abatement
John Besase	$1,067,889.74	$ 177,981.63	$ 889,908.11
George Besase	1,067,889.74	177,981.63	889,908.11
Sam Besase	1,067,889.74	177,981.63	889,908.11
Angelo Perna	1,067,889.74	177,981.63	889,908.11
Sam Rappaport	1,067,889.74	177,981.63	889,908.11
Ted Maison	1,067,889.74	177,981.63	889,908.11
Total	$6,407,338.44	$1,067,889.74	$5,339,448.70"

(emphasis supplied).

Count I of the plaintiff's Seven Count Amended Complaint (as amended September 22, 1972) alleges that defendant taxpayers John Besase, George Besase, Sam Besase, Joseph Besase, deceased, Angelo Perna, Sam Rappaport and Ted Maison operated a partnership for the conduct of gambling operations during the period January 31, 1961, through June 30, 1963. Count I further states

that on April 17, 1964, a delegate of the Secretary of the Treasury made assessments according to law against the above-named defendant taxpayers, as individuals and partners, for federal excise taxes, penalties and interest, and that despite demand for payment, there is presently due and owing from the defendants, individually and as members of a partnership, the sum of $927,411.76.

Count II of plaintiff's Amended Complaint seeks to reduce to judgment federal excise tax liabilities, penalties and interest assessed against defendant taxpayers John Besase, George Besase, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison, who are alleged to have operated a partnership for the conduct of gambling operations during the period July 1, 1963, through October 31, 1963.

Counts III, IV, V, VI and VII of the plaintiff's Amended Complaint seek to foreclose federal tax liens against certain properties allegedly owned by certain of the above-named defendant taxpayers, and to set aside certain conveyances of real property owned by certain of the defendant taxpayers on the grounds of fraud. Party defendants named in Counts III through VI include Josephine Besase, Lucas County State Bank, Cissie Rappaport, First Federal Savings and Loan Association, Anna Perna, Toledo Home Federal Savings and Loan Association, Thelma Kreitzer, Sylvania Savings Bank, Rosemarie Besase, Anthony Besase, Jr., George S. West, Pauline A. West, Thelma Mabel Besase, Roseanne Besase, and Ann Besase, all of whom are alleged to claim some interest in the properties involved.

Defendants John Besase, Sam and Ann Besase, Angelo and Anne Perna, and George and Josephine Besase have filed cross complaints against the government for refund and/or abatement of their income tax liabilities. Said de-

fendants prayed that if the Court reduced to judgment any of the wagering excise tax assessments claimed by the plaintiff, the defendant taxpayers be allowed income tax deductions of said excise taxes for the relevant years.

This case was previously tried on August 20, 1974, and judgment entered for the defendants, which was reversed by this Court on appeal by the plaintiffs and remanded for new trial. On October 4, 5 and 6, 1976, the case was retried on Counts I and II *only*.

The government, by oral stipulation in the August 20, 1974, trial (Tr. 15-21) withdrew its claim for the period January 1, 1961, to September 30, 1962.

Supporting Facts

In July 1963, Internal Revenue Service agents began a surveillance in Toledo of numbers operators who included the defendants. In the course of this surveillance, Internal Revenue Agents placed 2031 West Alexis Road, Toledo, Ohio, under observation. This building is a large apartment house containing four or five apartments, with one small apartment in the rear of the building. This was the apartment placed under surveillance. The Agents, for four days, on September 12, 16 and 18, and on October 14, 1963, observed this particular location from vantage points outside the apartment. On Wednesday, October 23, 1963, at 3 p.m., they executed a search warrant by entering the door of the rear apartment at 2031 West Alexis Road. It is on the basis of these *four days'* surveillance outside of the apartment that the government determined the six defendants were operating a single, 6-man partnership for a period of over *three years,* beginning in 1961.

This apartment, rented and occupied by Harold Bonta, not a defendant, consisted of a kitchen, a living room furnished with couch and chairs on the first floor, and bed-

room, closet and rear room on the second floor. The Agents found a rental receipt from January to February 1963 for the apartment on Bonta's person. (Bonta deposition, 12, 13) (Criminal trial Tr. 1020).

Betting slips seized in the raid appeared to be for wagers made on October 18, 21, 22 and 23, 1963. These slips, although somewhat difficult to interpret, were determined by the Internal Revenue Service to represent average daily receipts of $6,625.41 (Tr. 105). None of the slips were found on any of the defendants. No one testified that any of the slips had the name of any of the defendants on it. Several runners identified slips as theirs, but not one said any belonged to the defendants. The slips were found in Harold Bonta's apartment. He claimed that they were his property (Crim. Tr. 1081, 1198-1199). For this reason, Agent Michael arrested Bonta.

All items seized on October 23, 1963, in Bonta's apartment were the subject of a libel action in the U.S. District Court for the Northern District of Ohio, Western Division, C-64-33, filed 2/25/64, in which the United States, Libelant, alleged, in part, in its complaint that:

> "Harold Bonta engaged in and carried on the business of accepting wagers . . . and while so engaged, *he* did use and intend for use . . . the aforementioned property . . ." (emphasis supplied). (Appendix A)

The aforesaid property, described in exhibit A attached to the libel complaint, consisted of fifteen items, of which items 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 15 were seized at the 2031 West Alexis Road apartment. Item 15, listed "Miscellaneous Wagering Supplies and Paraphernalia, consisting of "K" books, numbers tickets, adding machine tapes and numbers records and materials", some seized at 1317 Washington Street, Toledo, Ohio, and some at the

West Alexis Road apartment. Government exhibits 52, 53, 54 and 55 are the wagering numbers slips and tapes seized on October 23, 1963, at the 2031 West Alexis Road apartment.

In March 1964, in response to the *Government* request, Judge Kloub of this Court ordered that all of the seized property be forfeited to the Internal Revenue Service and sold, and that the wagering numbers slips be destroyed by the United States Marshal (Def. Exh. 27, Appendix B).

Yet, the appellant-government has used these self-same identical slips—which it had requested to be destroyed—to determine defendants' liability in this action.

On April 17, 1964, defendants were notified that the Internal Revenue Service had made a jeopardy assessment against them for alleged unpaid excise taxes-wagering plus penalties for the period January 1, 1961, to June 30, 1963, in the amount of $584,474.85 taxes, $292,237.39 penalties, and $69,428.60 interest. On the same date, another notice of jeopardy assessment was made to the principal defendants (except Joseph Besase, deceased) for the period July 1, 1963, through October 1963 in the amount of $79,-526.28 taxes, $39,763.15 penalties, and interest, $2,459.37 (Plaintiff's Exh. 201 and 203). Both assessments were predicated on the theory that the principal defendants had been together in a single partnership operation for the periods involved.

In June, 1960, 1961, 1962 and 1963, Joseph, George and John Besase had filed annual wagering registration returns (Treasury Forms 11-C) with the Internal Revenue Service, reporting that they were doing business accepting wagers as a partnership under the name of the Star Company. Joseph Besase's name did not appear on the Form 11-C filed in June 1963 because of his death earlier that month (Plaintiff's Exhs. 13, 213A, 213B and 213C).

For each month from January 1961 through October 1963, George and John Besase (and until his death, Joseph Besase) filed a single wagering excise tax return for the Star Company. Each monthly return reported gross wagers accepted by the business in amounts ranging from $2,643.00 to $4,987.00 (except for the months of March through May 1963 in which substantially fewer wagers were accepted). The Besase brothers reported and paid the ten per cent Federal excise tax on their reported wagers (Pl. Exhs. 14-23, 216A through 216X, and 221).

In June 1960, 1961, 1962 and 1963, Sam Besase and Angelo Perna filed annual wagering registration returns (Treasury Forms 11-C) with the Internal Revenue Service, reporting that they were doing business accepting wagers as a two-man partnership (Pl. Exhs. 25, 214A, 214B and 214C).

For each month from January 1961 through October 1963, Sam Besase and Angelo Perna filed a single wagering excise tax return for their business. Each monthly return reported gross wagers accepted by the business in amounts ranging from $1,592 to $2,713 (except for the months of March through May 1963, in which substantially fewer wagers were accepted). Sam Besase and Angelo Perna reported and paid the ten per cent Federal excise tax on their reported gross wagers (Pl. Exhs. 26 through 35, 217A through 217X, and 221).

Julius Dekany, a certified public accountant in Toledo, Ohio, served as an accountant to the partnership of George, John and Joseph Besase (Star Company) and to the partnership of Sam Besase and Angelo Perna, from June 1961 through 1963. In that role, he prepared the monthly wagering excise tax returns and the annual wagering registration returns for his clients, based upon information provided by them to him (Tr. 457-59, 488-90).

In June 1963, Sam Rappaport and Ted Maison filed an annual wagering registration return (Treas. Form 11-C) with the Internal Revenue Service, reporting that they were doing business accepting wagers as a partnership under the name of M & R Company (Pl. Exh. 1).

For each month from January 1961 through October 1963, Sam Rappaport and Ted Maison filed a single wagering excise tax return for their business. Each monthly return reported gross wagers accepted by them in amounts ranging from $1,501 to $1,976 (except for the months of March through May 1963, in which substantially fewer wagers were accepted). Sam Rappaport and Ted Maison reported and paid the ten per cent Federal excise tax on their reported gross wagers (Pl. Exhs. 2 through 11, 218A through 218X, and 221).

All of the above three partnerships were audited and examined by Internal Revenue Service prior to 1963, including some returns filed for 1959 through 1962 (Tr. 466, 467, 294, and 342) and no question was ever raised about the existence of any seven-man or six-man partnership. The income tax returns for 1963 of the defendants did *not* include income from a six-man partnership but only from the respective two-man partnerships; yet, Internal Revenue Service has never alleged these returns were not correct.

There is no evidence or testimony that the alleged, unnamed, 6- or 7-man partnership ever *existed*.

REASON FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals made two fundamental errors in reaching its decisions and rendering its opinion in this case. These fundamental errors are of importance not only to the petitioners but to all taxpayers. The errors are:

1. The Circuit Court held that when the Internal Revenue Service assesses a partnership and its members for excise taxes, even though the Government is not able to prove the existence of the alleged partnership operation, some of the individual members may be held liable as individual operators, even though the Internal Revenue based its assessment on a partnership operation.

2. The Circuit Court held that even though the Trial Court heard the witnesses, examined the documentary evidence and concluded that since no partnership was proved, the alleged partners were not liable, the Circuit Court may re-evaluate the evidence; and even though *mistakenly* reading some of the testimony, may find that some of the alleged partners are liable for the tax as individual operators.

The Circuit Court stated in part (III, p. 6):

> "At trial, the ultimate factual question was whether the defendants had operated a common gambling partnership that received wagering income from January 1, 1961, through October 23, 1963. The District Court found the evidence insufficient to establish the existence of the alleged syndicate, and dismissed the case on the merits. We believe that portions of this finding were clearly erroneous. . . As to four of the defendants, we find no error in the District Court

conclusion that the evidence was insufficient to establish participation in or receipt of income from the alleged common partnership. . ."

In regard to the evaluation of evidence, the Circuit Court, in holding that defendant Ted Maison was liable, misread Mary Bilecki's testimony and stated in part:

"At an earlier trial, the transcripts of which were introduced in the present proceeding, Mary Bilecki identified certain numbers slips seized from the countroom as slips which she had written for and delivered to Maison".

The testimony of Mary Bilecki, referred to by the Circuit Court, clearly stated that the numbers slips seized by the Government (Exhibit 52M) were written for someone called "Bob" and definitely not written for Maison.

When dealing with questions of fact, the question is whether there is *any* evidence to sustain the conclusion reached by the Court below. A finding of fact by the trial Court cannot and should not be rejected on appeal where there was sufficient evidence to sustain it and where it is not contrary to the preponderance of evidence (3 AM. JUR. 900; *Memorial Hospital Associates v. Pacific Great Products Company,* 45 Cal.2d 634, 50 A.L.R.2d 442; *Halsell v. Renfrow,* 202 U.S. 287) and all reasonable inferences must be indulged to uphold it if possible (*Kansas City Stockyards of Maine v. Anderson,* 36 A.L.R.2d 1, 199 F.2d 91; *Kaiser Motors Corporation v. Savage* 229 F.2d 525.

When the Internal Revenue Service alleges the existence of a gambling partnership, and it is denied by the taxpayers, the burden is on the Internal Revenue Service to prove its existence. *Stanley Haimowitz v. Commissioner,* Tax Court Memo 1971-241 Dec. 30994, 30 T.C.M. 1034.

However, in addition to defendants denying the existence of the so-called 6-way partnerships, there was additional positive evidence supporting defendants in the form of prior Internal Revenue Service audits of their *individual* returns and *separate partnership* returns.

No proof was introduced by the government that the defendants ever belonged to a 6- or 7-way partnership from January 1961 to October 23, 1963. What the government claimed as proof was merely evidence that some of the defendants had met with several other persons for a few afternoons in Harold Bonta's apartment. The defendants' stated purpose of these meetings, which was uncontradicted, was to play cards and otherwise kill time until the daily numbers were published in the newspaper. This was consistent with defendants' businesses as reported on three separate partnership returns. All the defendants were interested in numbers, but that does not mean—nor was there any evidence—that they were engaged in it together. Their afternoon meetings were not inconsistent with their separate businesses, and certainly do not support any inference that they were engaged in a single operation.

Furthermore, the appellant-government, in presenting its case, asked the Court not only to find that the parties were engaged in this single, 6-way partnership operation in September and October 1963, but also continuously from January 1, 1961, to that time. Appellant even suggested that Joseph Besase, who died in June 1963 was a member of this so-called large partnership, yet there was not one iota of testimony that he, with his two brothers, ever engaged in anything other than the reported and audited Star partnership. It was obvious to the trial Court that the government's case was based entirely on assumption and suspicion, rather than proof and evidence (see *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969)).

In trial, defendants objected to the admissibility of the numbers slips seized at West Alexis Road on the ground they were not found in the possession of the defendants but rather in Harold Bonta's apartment, and because Bonta said they were his. Further, in its aforesaid forfeiture action, the government itself stated the numbers slips were used and intended for use by Harold Bonta.

Moreover, in the libel action on February 25, 1964, the government asked for a Court order for destruction of these numbers slips—and it was so ordered—yet, these same slips *never were destroyed*; and now, in this present action, the government is using them against the defendants.

The government has therefore taken two inconsistent approaches to ownership and use of these slips. If Harold Bonta used them, they could scarcely have been used by the alleged 6-way partnership. When the government requested the Court order for their destruction, it stated the slips were used by Harold Bonta and others unnamed; therefore, it is obvious the government did not mean these six defendants—for, if it had, it would have named them, since these six defendants had already been arrested in October 1963 prior to the Court order it requested.

Since the government stated that Bonta and others used the slips, Bonta is placed in position of a principal—but Bonta has never been alleged a partner in the so-called 6-way partnership.

The slips do not prove any tax liability of the defendants. They prove at most that Bonta had in his possession a collection of numbers slips for four days of October 1963. There is no proof they belonged to the alleged 6-man partnership.

The Government, by securing a Court order for destruction of these numbers slips, should be estopped by the judgment and destruction order from using them and relying on them to determine a tax against the defendants. "*Equity considers done which should have been done*". If this rule were applied, Exhibits 52, 53, 54 and 55, the numbers slips, would have no legal existence.

The maxim that "he who comes into equity must come with clean hands" is an ancient and favored precept of the chancery Courts. Under modern practice, equity Courts no longer exist separately, but Courts sit both in equity and law. It is significant that a litigant may be denied relief on the ground that his conduct has been inequitable. This principle is expressed as "he that hath committed inequity shall not have equity", *National Federal Insurance Co. v. Thompson,* 281 U.S. 331; *Milwaukee and M. R. Co. v. Soutter,* 13 Wall. (U.S.) 517.

Relief will be denied where the right upon which complainant allegedly relies has grown out of a wrong, a breach of duty, or a violation of law, *Deweese v. Reinhard,* 165 U.S. 386.

Lord Chief Justice Wilmot observed, "No polluted hand shall touch the pure fountain of Justice; and those so entering the Temple shall be expelled with the anathema, 'Procule, O procule, este profani' ", *Rock v. Mathews,* 35 W. Va. 531, 14 S.E. 137, 14 L.R.A. 508.

A complainant will not be permitted to take advantage of his own wrong.

The daily receipts represented by the slips seized October 23, 1963, do not prove that the defendants engaged in a 6- or 7-way partnership and received wagers as projected by the government for the period January 1, 1961, until October 23, 1963. No one ever testified that such

receipts came to the alleged partnership; no one ever testified that such a partnership, if it existed, did not pay the taxes (*Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969)).

The findings of the Internal Revenue Service are actually arbitrary and capricious. No agent of the government has ever testified that the findings and computations are correct. No government witness has ever even stated that he made the determination nor assumes the responsibility for the determination.

The government places heavy reliance on the statement of Special Agent Michaels that he had heard Harold Bonta during the raid ask Sam Besase whether he should take the blame. This testimony, while it is useful to the government's attempt to impeach Bonta, is offset by other evidence, such as:

1. The arrest of Bonta in the raid of October 23, 1963, for operating a wagering business without a tax stamp;

2. The government's serving the inventory of seized articles with Harold Bonta;

3. The government's libel action filed on February 25, 1964, against Harold Bonta's automobile and all other articles seized in the raid of October 23, 1963, from 2031 West Alexis Road, alleging that Harold Bonta used such articles while engaging in the business of accepting wagers (Appendix A);

4. Rental receipts found on Bonta's person at the time of raid on October 23, 1963, acknowledging payment of rent for apartment at 2031 West Alexis Road for January and February, 1963 (Crim. Trial Tr. 1020).

The government argued that the trial Court erred in holding that the burden is on the government to establish

its contention, once the taxpayer produces competent and relevant evidence to show the Internal Revenue Service assessment is in error. It cites several cases to support the proposition that taxpayer bears the burden of proving by a preponderance of the evidence that an alleged deficiency is erroneous.

The Court below correctly held for Appellees on the basis that they had carried their burden by a preponderance of the evidence. In its opinion the trial Court stated this clearly, as follows:

> ". . . The Court finds that the defendant taxpayers have carried their burden of refuting by a preponderance of the credible evidence the presumption of correctness attached to plaintiff's tax assessments . . ." (p. 22)

Although the government's case is founded on the fallacious assumption that a 6- or 7-man partnership was the operation of an unreported numbers operation, the government, for the first time on appeal, raised the issue that if defendants were not a part of a 6-way partnership, then they must have had unreported wagers in their individual capacity (Appellant's Brief, 40, 41, C.A.6). The government stated:

> "Taxpayers, however, are not simply required to disprove, and certainly the government is not required to prove, the existence of a common partnership."

This is an extraordinary statement from the appellant whose case is predicated on an assessment of approximately $1,000,000 against an alleged 6-way partnership. Clearly, if no such partnership existed, no liability existed.

It was a little late for the government to change horses, but if it does, it should make a new assessment against the individuals as such, rather than as partners,

since the present assessments admittedly stem from the so-called 6-man partnership.

The appellant attempted to distinguish the law of *Haimowitz* (*supra*) and *Weir** (Appellant's Brief 38, C.A.6) by stating that in *Weir* there was no evidence contradictory to the taxpayers' testimony. Appellee submits the same situation exists here—taxpayers denied the existence of a 6-way partnership numbers operation, corroborated by prior Internal Revenue Service audits. No evidence to contradict this was offered by government. The meetings of the defendants, with others, on the afternoons of three days in September 1963 and one day in October 1963 is scarcely proof of a 6-man partnership operation. Their meetings were more consistent with their explanations than with the unfounded assumption that the defendants were in a single 6-way operation. Thus, the law of *Haimowitz* and *Weir** is applicable and should control.

The Supreme Court in its opinion in *Helvering v. Taylor*, 293 U.S. 507 (1935), states in part:

> ". . . He also cites rule 30 adopted by the board: 'The burden of proof shall be upon the petitioner except as otherwise provided by statute and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent'. But, there is nothing in it to suggest intention to require the taxpayer to prove not only that a deficiency assessment laid upon him was arbitrary and wrong, but also to show the correct amount. Moreover, the board held the evidence not sufficient to show the apportionment erroneous, and on that ground alone sustained the assessment. Necessarily, the board did not come to the question that is here presented as the burden of proof.

**Weir v. Commissioner*, 283 F.2d 675 (6th Cir. 1970).

The fact that the commissioner's determination of deficiency was arbitrarily made may reasonably be deemed sufficient to require the board to set it aside . . .

"We find nothing in the statutes, the rules of the board, or our decisions that gives any support to the idea the commissioner's determination, shown to be *without rational foundation and excessive,* will be enforced unless the taxpayer proves he owes nothing or, if liable at all, shows the correct amount. While decisions of the lower court may not be harmonious, our attention has not been called to any that persuasively supports the rule for which the commissioner here contends . . .

"But, where, as in this case, the taxpayers' evidence shows the commissioner's determination to be *arbitrary and excessive* it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. On the facts shown by the taxpayer in this case, the board should have held the apportionment arbitrary, and the commissioner's determination invalid . . ."

In *United States et al. v. Janis,* 96 S. Ct. 3021, the Supreme Court in its opinion stated in part:

"What we have found is a 'naked' assessment without *any* foundation whatsoever if what was seized by the Los Angeles police cannot be used in the formulation of the assessment. The determination of tax due then is 'without rational foundation and excessive' and not properly subject to the usual role with respect to the burden of proof in tax cases."

CONCLUSION

The Trial Court, in finding that the Government failed to prove the existence of a six-way partnership wagering operation, was correct in holding that no one of the partners was liable since the assessment by the Internal Revenue Service was against them only as members of the alleged six-way partnership and the Government rested its case solely upon this basis. Thus, the Circuit Court was in error in holding that three of the alleged partners were liable as individual operators of a wagering operation. The Circuit Court was also in error in holding that the Trial Court was clearly erroneous in its finding when the Circuit Court based its reversal in part on an erroneous reading of the testimony of a Government witness. Accordingly, Petitioners request that a Writ of Certiorari be allowed and this Court review the Judgment of the Court of Appeals and reverse that part of the Judgment which reverses the finding of the Trial Court.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 17, 1980)

No. 78-3047

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOHN BESASE, GEORGE BESASE, SAM BESASE, ANGELO PERNA, SAM RAPPAPORT, TED MAISON,
Defendants-Appellees.

ESTATE OF JOSEPH BESASE, JOSEPHINE BESASE, LUCAS COUNTY STATE BANK, CISSIE RAPPAPORT, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, ANNA PERNA, TOLEDO HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, THELMA KREITZER, SYLVANIA SAVINGS BANK, ROSEMARIE BESASE, ANTHONY BESASE, JR., GEORGE S WEST, and PAULINE A WEST,
Defendants.

ON APPEAL From the United States District Court
For the Northern District of Ohio

Before: CELEBREZZE, MERRITT *and* JONES, *Circuit Judges.*

MERRITT, *Circuit Judge.* The government appeals the dismissal of its civil action to collect wagering excise

taxes, fraud penalties, and interest from the defendants. The government contends the defendants failed to report and pay tax on all of their gross income from a numbers operation. Two issues are presented: (1) did the District Court correctly allocate the burden of proof between the parties; and (2) did the District Court correctly conclude that the government had failed to carry its burden with respect to any of the defendants. We affirm with respect to all of the defendants except three. In those three cases we reverse.

I.

During the tax years involved in this case, the Internal Revenue Code imposed an excise of ten per cent on the gross amount of wagers. 26 U.S.C. § 4401(a). For fraudulent deficiencies, the Code additionally affixed a civil penalty amounting to fifty per cent of the excise. 26 U.S.C. § 6653(b). All persons engaged in the business of accepting wagers were subject to the tax. 26 U.S.C. § 4401(c). Such persons were required to identify themselves yearly by registering with the Internal Revenue Service. 26 U.S.C. § 4412(a).

The defendants, each of whom was a self-avowed numbers operator, registered annually in the form of three separate partnerships. George Besase and John Besase filed their registration form as partners. Joseph Besase joined them until his mid-1963 death. Sam Besase and Angelo Perna likewise registered together as partners. Sam Rappaport and Ted Maison filed as a third partnership. Each partnership claimed to operate a separate numbers game.

At stake for players of the numbers games was a jackpot that could be won by correctly guessing a three-digit number. The winning number would be derived

from afternoon stock market reports. After the number and winners were determined, and payoffs made, the partners would split the remaining proceeds.

The three partnerships each filed separate monthly wagering tax returns. Between January 1, 1961, and October 23, 1963, the combined monthly gross income reported by the three partnerships ranged from approximately $5,000 to $10,000.

The government claims that the defendants actually operated a single partnership which earned a monthly gross income of approximately $145,000. According to the government, the alleged partnership was in business from January 1, 1961, through October 23, 1963, but did not report or pay any wagering tax liability. The government assessed over one million dollars in wagering excise taxes, fraud penalties and interest[1] on the income allegedly derived from the unregistered single partnership, and sought to reduce this amount to judgment in the District Court.[2]

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1. Upon entry of the judgment by the District Court, the unpaid balance on the assessment against all of the defendants for the period January 1, 1961, through June 30, 1963, was $925,804.98, which amount included a tax of $549,474.85, a penalty of $292,237.49, and an interest charge totalling $69,428.60. The unpaid balance on the additional assessment against all of the defendants except Joseph Besase, who died in mid-1963, was $121,748.80, which amount included $79,525.28 in taxes, $39,763.15 in penalties, and $2,459.37 in interest.

2. The District Court previously dismissed this case after ruling that the search warrant pursuant to which the government had seized evidence was invalid. This Court reversed and remanded for trial. *See* United States v. Besase, 521 F.2d 1306 (6th Cir. 1975). Prior to the present civil action, the government had sought to convict these same defendants—except Joseph Besase, who had died—of wagering excise tax evasion. Although the government won a conviction based on the same set of circumstances as the current case presents, this Court reversed. *See* United States v. Besase, 373 F.2d 120 (6th Cir. 1967). The reversal was based on the failure of the government to introduce evidence establishing that the alleged partnership had failed to file excise tax returns.

II.

The District Court, at a bench trial, placed the ultimate burden of persuasion on the government. An initial presumption of correctness applies to assessments. *Sharwell v. Commissioner of Internal Revenue,* 419 F.2d 1057, 1060 (6th Cir. 1969). At the outset, therefore, taxpayers usually have the burden of producing evidence to refute the validity of an assessment. *See Foster v. Commissioner of Internal Revenue,* 391 F.2d 727, 735 (4th Cir. 1968).

The District Court allowed the defendants to shift the burden of proof back to the government simply by producing evidence from which it could be found that the assessment was incorrect. Thereafter the government had to substantiate the validity of its claims, and bore the risk of non-persuasion. The impracticality and inequity of requiring a taxpayer to prove a negative allegation such as the non-existence of a common partnership, said the District Court, warranted the lighter burden of defendants' proof.

The government challenges two aspects of the burden of proof formula. First the government argues that, regardless of the nature of a taxpayer's proof, taxpayers always must disprove the validity of an assessment by a preponderance of the evidence. Only with respect to fraud penalties does the government concede that it bears the ultimate burden of persuasion by a preponderance of the evidence. Secondly, the government insists that it was not the existence of a common partnership that the defendants had to disprove, but rather the non-receipt of income. The proof tied each defendant to the underlying gambling operation, says the government, and thus made each defendant individually and personally liable for the taxes due. According to the government, then, both the

formulation and the stated object of the burdens of proof were wrong.

The District Court correctly allocated the relative burdens of proof. This is an action to collect a tax assessment. In such cases, this Court consistently has given the assessment an initial presumption of validity. *See Sharwell v. Commissioner of Internal Revenue,* 419 F.2d at 1060. It devolves at once upon the taxpayer to challenge the assessment. *Id.* Where it is a negative assertion that a successful taxpayer would have to prove, though, the "law imposes much less of a burden upon a taxpayer." *Weir v. Commissioner of Internal Revenue,* 283 F.2d 675, 679 (6th Cir. 1960). Reasonable denials of the assessment's validity have sufficed in such cases to shift the burden back to the government. *Id.* The government then bears the task of substantiating its assessment in cases of this type.

As in *Weir,* the defendants ultimately had to prove their non-receipt of income in order to prevail. They denied the existence of, and the receipt of income from a common partnership. They characterized the nature of their relationship as social, and offered testimony to support the explanation. The nature of their proof justified use of the lighter burden and allocation of the ultimate risk of non-persuasion to the government. *See generally* C. McCormick, Handbook of the Law of Evidence § 378; J. Wigmore, Evidence § 2485 (discussing apportionment considerations).

Indeed, the burden of proof could not otherwise have been allocated without risking a violation of defendants' privilege against self-incrimination. In *Grosso v. United States,* 390 U.S. 62, 65-69 (1968), the Supreme Court ruled that the Fifth Amendment privilege against self-incrimination precluded federal criminal prosecution for failure to file the required wagering tax forms. At the basis of the

Court's decision was the Hobson's choice that federal wagering tax laws pose to gamblers. Before the *Grosso* decision, a gambler had no choice but to file returns and pay the tax and possibly incriminate himself under state law, or not comply and possibly incur a federal penalty. To preserve the efficacy of the self-incrimination privilege, the Court prohibited the imposition of certain criminal sanctions for failure to comply with the wagering tax laws.

The choice between self-incrimination and undue forfeiture looms no less ominously in the context of a civil action to collect the wagering excise. A gambler who wants to challenge the correctness of an assessment runs a high risk of incriminating himself under state law. The government, for example, erroneously may impose a wagering tax assessment of $20,000 when, in fact, the taxpayer owes only $10,000. To show error in the assessment, the taxpayer may have no choice but to divulge the inculpating details of his wagering operation and thus expose himself to state prosecution.[3] If a prudent gambler decides not to challenge the assessment lest he invite a state criminal prosecution, he often averts self-incrimination only at the cost of unwarranted tax liability. To allow a gambler to disprove the validity of a wagering tax assessment only by a preponderance of the evidence could penalize the exercise of the privilege against self-incrimination in a manner that the Supreme Court outlawed in *Grosso*.

The burden of proof used by the District Court accommodates both the privilege against self-incrimination and the presumption of accuracy normally accorded to government tax assessments. It neither forces the protesting taxpayer to expose himself to state criminal liability nor

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3. *Cf.* OHIO REV. CODE § 2915.02(A)(5) (Baldwin's 1974) ("No person shall . . . [w]ith purpose to violate . . . this section, acquire, possess, control, or operate any gambling device").

robs the government of the advantage gained by the initial presumption. It merely spares the taxpayer from the threat of self-incrimination by requiring the government to justify its claim. Accordingly, we find no error in the apportionment of the burden of proof by the District Court.

III.

At trial, the ultimate factual question was whether the defendants had operated a common gambling partnership that received wagering income from January 1, 1961, through October 23, 1963. The District Court found the evidence insufficient to establish the existence of the alleged syndicate, and dismissed the case on the merits. We believe that portions of this finding were clearly erroneous.

The government based its income estimate and common partnership theory on evidence seized in a surprise raid by investigative agents of the Internal Revenue Service. The object of the raid was the apartment building at 2031 West Alexis Road in Toledo, Ohio. Several of the defendants and their relatives had built and lived in the building since the late 1940s.

The raid occurred at 3:00 P.M. on Wednesday, October 23, 1963, following several days of surveillance. Investigators saw each of the defendants (except Joseph Besase, who was dead) and several other persons entering and leaving the building, usually at mid-afternoon, during the surveillance period. All but one of the living defendants, plus several other persons, were in the building at the time of the raid.

Agents found four of the defendants inside a concealed countroom. The countroom, hidden behind a removable panel in a bedroom closet, was on the top floor of the

two-story building. George and Sam Besase, Angelo Perna and Sam Rappaport were there. John Besase was in the adjacent bedroom. Only Ted Maison, who on earlier occasions had been observed entering and leaving the premises, was not present in the building.

On tables and in closets around the room, agents found several stacks of numbers slips, several thousands of dollars in cash, several adding machines and adding machine tapes. During the raid, the telephone in the countroom rang. The caller unwittingly, and belatedly, advised the IRS agent who answered the phone that a raid was about to occur. A notebook containing a mixture of utility bills addressed to various of the defendants and their alleged employees also was discovered. The telephone number of the accountant for two of the defendants' duly registered partnerships was spotted on a piece of insulation tape. In addition to the defendants, several other persons also were present in the countroom or contiguous bedroom. Harold Bonta, a non-defendant who was in the countroom, told the agents that he alone was responsible for the countroom. Pursuant to the raid, the agents arrested Bonta and the present defendants.

At trial, the defendants who testified denied any prior knowledge of the use of the concealed room, and disclaimed the existence of a common partnership. According to the defendants, they knew each other socially, and met occasionally in a first-floor recreation room at 2031 West Alexis Road. There they would play cards or discuss sports events while awaiting news reports of stock market closing statistics. The defendants who testified insisted that, when the raid began, they fled upstairs in fright and came upon the hidden room. They further maintained that they had reported and paid all wagering tax liability on their partnership returns.

As to four of the defendants, we find no error in the District Court conclusion that the evidence was insufficient to establish participation in or receipt of income from the alleged common partnership. The only evidence of John Besase's alleged involvement in the countroom operation is his presence just outside the hidden room. There was no credible pertinent evidence against the late Joseph Besase except his association with George and John Besase in the registered partnership, for which returns properly were filed. The relevant evidence against George Besase, who was found in the countroom, consists of a blank tax form addressed to G & J Besase (his wife's name was Josephine and his living partner's name was John) and three utility bills for his personal residence that were found in the countroom. The evidence against Angelo Perna consists mainly of his presence in the countroom at the time of the raid. The registration form filed by each of these defendants lists 2031 West Alexis Road as the home address. The proof against these defendants, however, does not convincingly tie them to any common partnership or establish their receipt of income beyond that which they duly reported in the tax returns of this registered partnership.

As to defendants Sam Besase, Ted Maison and Sam Rappaport, we believe that the evidence clearly ties them to the countroom operation. Sam Besase was found in the countroom at the time of the raid. The countroom telephone was registered in his name. A numbers runner named John Spencer testified that he occasionally would deliver numbers slips to Sam Besase. Spencer also testified that when he anticipated a late delivery of his numbers slips, he would call the countroom and ask for "Sam." A person whose voice he identified as that of Sam Besase would answer. In addition, Spencer identified numbers

slips found in the countroom as ones he had written for and delivered to Sam Besase.

The proof against Ted Maison ties him also to the countroom operation. Maison was not present at 2031 West Alexis Road at the time of the raid. Yet IRS agents saw him entering and leaving the building during their pre-raid surveillance. At an earlier trial, the transcripts of which were introduced in the present proceeding, Mary Bilecki identified certain numbers slips seized from the countroom as slips she had written for and delivered to Maison.

The evidence against Sam Rappaport is likewise compelling. Rappaport was in the countroom at the time of the raid. On his person were pieces of paper containing the countroom telephone number and codes identical to those on various numbers slips stacked around the countroom. Spencer, the runner, testified that he occasionally delivered numbers slips to Rappaport, whose registration form claimed no employees. As with Sam Besase and Ted Maison, the evidence against Sam Rappaport establishes his connection with the countroom operation.

In summary, the finding of the District Court regarding George Besase, John Besase, Joseph Besase and Angelo Perna is not clearly erroneous. The government, however, carried its burden of proof with regard to Sam Besase, Ted Maison and Sam Rappaport. Insofar as the District Court judgment relieves Sam Besase, Ted Maison and Sam Rappaport of liability for the wagering tax on income earned by the countroom operation, we therefore reverse.

IV.

The government computed the defendants' countroom income by the "projection of daily earnings" method. From the countroom, IRS agents seized numbers slips written on the day of the raid and the three previous betting days. Adding machine tapes that recorded the receipts for the four days also were found. Totals on the tapes indicated that the average daily receipts for the countroom numbers operation were $6,625.42. The government projected the income and tax liability of the defendants from this four-day average. The defendants, who steadfastly denied any connection to the countroom and thus introduced no business records or other evidence to contradict the income extrapolation, did not object to the projection of income method.

In the absence of business records or other pertinent evidence, the government has the right to rely on the best available evidence to determine a taxpayer's income. *See United States v. Firtel*, 446 F.2d 1005, 1006-07 (5th Cir. 1971). In several wagering tax assessment cases, we have countenanced the use of the projection method. *See, e.g., Hallabrin v. Commissioner of Internal Revenue*, 325 F.2d 398, 301 (6th Cir. 1963). There being no evidence to cast doubt on the projected amount of income, the government thus has met its burden of proof in establishing the amount of unreported income.

The proof also establishes that the wagering tax underpayments on this income were due to fraud. Because the District Court found no tax liability, it did not reach this question. The government, however, met its burden of proving fraud. The three defendants consistently failed to report substantial amounts of wagers for several years. They sought to conceal the countroom and the receipts from the operation. They kept no adequate records of

the countroom's receipts. In view of these considerations, we believe that the government clearly established, by a preponderance of the evidence, that the underpayments were fraudulent. *See Adler v. Commissioner of Internal Revenue,* 422 F.2d 63, 67 (6th Cir. 1970); *Friedman v. Commissioner of Internal Revenue,* 421 F.2d 658, 659 (6th Cir. 1970). To the defendants' tax liability, therefore, a fifty per cent fraud penalty properly was added. *See* 26 U.S.C. §§ 6653(b).

The judgment of the District Court therefore is affirmed in part and reversed in part.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Dated August 30, 1977)

No. C 71-58

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs

JOHN BESASE, *et al.*,
Defendants.

FINDINGS OF FACT and CONCLUSIONS OF LAW

WALINSKI, *J*:

Preliminary Statement

This suit is brought by the United States of America [hereinafter government] to reduce to judgment certain wagering excise tax assessments and fraud penalties levied against the defendant taxpayers. Plaintiff commenced the action pursuant to the provisions of §§ 7401-7403 of the Internal Revenue Code of 1954, 26 U.S.C. §§ 7401-7403. Jurisdiction is alleged under 28 U.S.C. §§ 1340 and 1345, and 26 U.S.C. §§ 7402 and 7403.

Count I of the plaintiff's Seven Count Amended Complaint (as Amended September 22, 1972) alleges that defen-

dant taxpayers John Besase, George Besase, Sam Besase, Joseph Besase, deceased,[1] Angelo Perna, Sam Rappaport and Ted Maison operated a partnership for the conduct of gambling operations during the period January 31, 1961, through June 30, 1963. Count I further states that on April 17, 1964, a delegate of the Secretary of the Treasury made assessments according to law against the above-named defendant taxpayers, as individuals and partners, for federal excise taxes, penalties and interest, and that despite demand for payment, there is presently due and owing from the defendants, individually and as members of a partnership, the sum of $927,411.76.

Count II of plaintiff's Amended Complaint seeks to reduce to judgment federal excise tax liabilities, penalties and interest assessed against defendant taxpayers John Besase, George Besase, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison, who are alleged to have operated a partnership for the conduct of gambling operations during the period July 1, 1963, through October 31, 1963.

Counts III, IV, V, VI and VII of the plaintiff's Amended Complaint seek to foreclose federal tax liens against certain properties allegedly owned by certain of the above-named defendant taxpayers, and to set aside certain conveyances of real property owned by certain of the defendant taxpayers on the grounds of fraud. Party

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1. Plaintiff's original Complaint named Joseph Besase, then deceased, as a defendant. Plaintiff's Amended Complaint, filed April 27, 1970, substituted the estate of Joseph Besase as a party defendant. On June 5, 1974, the Court entered a *Judgment Order* dismissing the action against the estate of Joseph Besase, deceased. Notwithstanding that *Judgment Order*, plaintiff requests that the Court make a finding that until his death Joseph Besase was an equal partner in a common numbers operation with defendants Sam Besase, George Besase, John Besase, Angelo Perna, Ted Maison and Sam Rappaport, and that Joseph Besase was jointly liable for wagering excise taxes that accrued prior to his death in June, 1963.

defendants named in Counts III through VII include Josephine Besase, Lucas County State Bank, Cissie Rappaport, First Federal Savings and Loan Association, Anna Perna, Toledo Home Federal Savings and Loan Association,[2] Thelma Kreitzer, Sylvania Savings Bank, Rosemarie Besase, Anthony Besase, Jr., George S. West, Pauline A. West, Thelma Mabel Besase, Roseanna Besase, and Ann Besase, all of whom are alleged to claim some interest in the properties involved.

Defendants John Besase, Sam and Ann Besase, Angelo and Anna Perna, and George and Joseph Besase have filed cross complaints against the government for refund and/or abatement of their income tax liabilities. Said defendants pray that if the Court reduces to judgment any of the wagering excise tax assessments claimed by the plaintiff, the defendant taxpayers be allowed income tax deductions of said excise taxes for the relevant years.

Counts I and II *only* were tried to the Court on October 4, 5, and 6, 1976. The Court having considered the evidence presented at trial and the legal memorandum of counsel hereby makes the following Findings of Fact.

Findings of Fact

(1) On April 17, 1964, a delegate of the Secretary of the Treasury of the United States made an assessment against John Besase, George Besase, Joseph Besase, deceased, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison, as individuals and partners, for federal wagering excise taxes, penalties and interest for the period January 1, 1961, to June 30, 1963, in the following amounts:

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2. With the consent of the parties, defendant Toledo Home Federal Savings and Loan Association was ordered dismissed from the action on August 2, 1971.

Tax	Penalty	Interest
$548,474.85	$292,237.49	$69,428.60

Notice of the assessment and demand for payment were duly given to George Besase, John Besase, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison. Admissions filed August 16, 1971; Tr. at 184. The present unpaid balance upon said assessment is $925,804.98, plus statutory additions as provided by law. Plaintiff's Exhibits 201 and 203.

(2) On April 17, 1964, a delegate of the Secretary of the Treasury of the United States made an assessment against John Besase, George Besase, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison, individually and as partners, for federal wagering excise taxes, penalties and interest for the period July 1, 1963, to October 31, 1963, in the following amounts:

Tax	Penalty	Interest
$79,526.28	$39,763.15	$2,459.37

Notice of the assessment and demand for payment were duly given to George Besase, John Besase, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison. Admissions filed August 16, 1971; Tr. at 184. The present unpaid balance upon said assessments is $121,748.80, plus statutory additions as provided by law. Plaintiff's Exhibits 205 and 207.

(3) A "Special Tax Return and Application for Registery - Wagering" (Treasury Form 11-C) was filed with the Internal Revenue Service by Joseph, George and John Besase on each of the following dates: June 29, 1960 (for the period July 1, 1960, to June 30, 1961); June 21, 1961 (for the period July 1, 1961, to June 30, 1962); June 25, 1962 (for the period July 1, 1962, to June 30, 1963). Each re-

turn indicates that Joseph, George and John Besase were then engaged in the business of accepting wagers on their own account, as a partnership under the name of the Star Company. All returns stated the home address of each partner as 2031W. Alexis Road, Toledo, Ohio. The returns indicated that their business address was at 5519 W. Rowland Street, Toledo, Ohio, from July 1, 1960, to June 30, 1962, and thereafter at 2703 Lyceum Street, Toledo, Ohio. All returns stated that the partnership had no employees or agents engaged in receiving wagers on its behalf. Plaintiff's Exhibits 213A, 213B and 213C.

(4) On June 29, 1963, John Besase and George Besase filed a "Special Tax Return and Application for Registery - Wagering" for the period July 1, 1963, to June 30, 1964. Said return indicated that John Besase and George Besase were then engaged in the business of accepting wagers on their own account, as a partnership under the name of the Star Company, Joseph Besase having withdrawn from the partnership by reason of his death on June 2, 1963. Said return gave the home addresses of John and George Besase as 2031 W. Alexis Road, Toledo, Ohio, and the business address of the Star Company as 2703 Lyceum Street, Toledo, Ohio. The return further stated that the partnership had no employees or agents engaged in receiving wagers on its behalf. Plaintiff's Exhibit 13.

(5) For each month from January, 1961, through October, 1963, George and John Besase (and until his death, Joseph Besase) filed a wagering excise tax return (Treasury Form 730) with the Internal Revenue Service for the Star Company. Each monthly return reported gross wagers accepted by the business in amounts ranging from $2,240.00 to $4,987.00 (except for the months of March, 1963, when gross wagers of only $1,733.00 were reported, and April, 1963, when no wagers were reported). John, George and Joseph Besase paid the ten percent federal excise tax on

their reported wagers. Plaintiff's Exhibits 14 through 23, and 216A through 216X.

(6) A "Special Tax Return and Application for Registery - Wagering" was filed with the Internal Revenue Service by Sam Besase and Angelo Perna on each of the following dates: June 28, 1960 (for the period July 1, 1960, to June 30, 1961); June 21, 1961 (for the period July 1, 1961, to June 30, 1962); June 25, 1962 (for the period July 1, 1962, to June 30, 1963); and June 29, 1963 (for the period July 1, 1963, to June 30, 1964). Each return indicated that Sam Besase and Angelo Perna were then engaged in the business of accepting wagers on their own account, as a partnership. The returns gave 2031 W. Alexis Road, Toledo, Ohio, as the home address of both partners, and gave 5519 W. Rowland Street, Toledo, Ohio, as the business address of the partnership. The returns further stated that the partnership had no employees or agents engaged in receiving wagers on its behalf. Plaintiff's Exhibits 214A, 214B, 214C and 25.

(7) For each month from January, 1961, through October, 1963, Sam Besase and Angelo Perna filed a wagering excise tax return (Treasury Form 730) with the Internal Revenue Service for their partnership. Each monthly return reported gross wagers accepted by the partnership in amounts ranging from $2,713.76 to $1,592.00 (except for the months of March, April and May, 1963, when wagers accepted were $1,127.00, -0-, and $1,084.00, respectively). Sam Besase and Angelo Perna paid the ten percent federal excise tax on their reported wagers. Plaintiff's Exhibits 26 through 35, and 217A through 217X.

(8) A "Special Tax Return and Application for Registery - Wagering" was filed with the Internal Revenue Service by Sam Rappaport and Ted Maison on June 25, 1963 (for the period covering July 1, 1963, to June 30,

1964). Said return indicated that Sam Rappaport and Ted Maison were then engaged in the business of accepting wagers on their own account, as a partnership under the name of the M & R Company. The return gave 2306 Berdan, Toledo, Ohio, as the home address of Sam Rappaport, and 2837 Drummond Road, Toledo, Ohio, as the home address of Ted Maison. 4555-1/2 Monroe Street, Toledo, Ohio, was listed as the business address of the partnership. The return further stated that two employees, Mary Bilecki and Anthony Stopera were employed by the partnership to receive wagers. Plaintiff's Exhibit 1.

(9) For each month from January 1, 1961, through October, 1963, Sam Rappaport and Ted Maison filed a wagering excise tax return (Treasury Form 730) with the Internal Revenue Service for their partnership. Each month's return reported gross wagers accepted by the partnership in amounts ranging from $1,501.00 to $1,976.00 (except for the months of March, April and May, 1963, when wagers accepted were $958.00, -0-, and $1,022.00, respectively). Sam Rappaport and Ted Maison paid the ten percent federal excise tax on their reported wagers. Plaintiff's Exhibits 2 through 11, and 218A through 218X.

(10) Julius Dekany, a certified public accountant in Toledo, Ohio, served as an accountant to the partnership of George, John and Joseph Besase (Star Company) and to the partnership of Sam Besase and Angelo Perna from June, 1961, through 1963. In that role, he prepared the monthly wagering excise tax returns and the annual wagering registration returns for his clients, based upon information provided by them to him. Tr. at 457-59 and 488-90.

(11) All the principal defendants surviving at trial, George Besase, John Besase, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison, admit that they were engaged in the business of accepting numbers wagers in

and around Toledo, Ohio, during the period between January, 1961, and October 23, 1963.

(12) Defendant taxpayers Angelo Perna, Sam Rappaport, Sam Besase, George Besase and Ted Maison denied at trial that they were members of a common partnership one with the other.

(13) A numbers operation is a form of gambling in which each player or bettor attempts to guess a daily three-digit number, which number will be arbitrarily determined, usually from stock market closings. The player gives his number to a writer (an individual who accepts wagers), together with the amount of the wager. The writer writes the player's bet on a three by five inch white sheet of paper, and accumulates these over the day and turns them over to a pickup man, or runner. The pickup man will deliver the slips to a numbers bank or headquarters, where all of the wagers are examined, the winning tickets are identified, and arrangements are made to pay off the winners. A person may function both as a writer and a runner, and as a controller or operator. Criminal Tr. at 56-83 [hereinafter all references to the Criminal Transcript, admitted into evidence at trial as Plaintiff's Exhibits 106, 107, 108, 109 and 110, will be cited as Cr.].

(14) In the numbers bank or counthouse, after the winning number has been determined and the winning slips identified, the day's number slips are then kept separate and are maintained for a period of several days in case the bank has overlooked a winning slip. Cr. at 79-80.

(15) In July, 1963, Internal Revenue Service agents began surveillance in Toledo of numbers operators, who included the defendant taxpayers. The Internal Revenue surveillance, though not continuous, covered the period July, 1963, to October 23, 1963.

(16) On September 12, 16 and 18, 1963, and on October 14, 1963, Internal Revenue agents placed 2031 W. Alexis Road, Toledo, Ohio, under surveillance. On all of those days defendant taxpayers George Besase, John Besase, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison were seen entering the rear door of the building at that location. On most of those days in question Paul McDonald (alias Little Paul), Harold Bonta, George Stoianoff, John Mercurio, George Mercurio, Richard Kaydis and Anthony Besase, Jr. were also observed approaching and/or entering the rear door. The persons observed would typically enter between 1:30 and 3:00 P.M. Cr. at 791-800, 1177-81. Plaintiff's Exhibits 241-244.

(17) On Wednesday, October 23, 1963, at 3:00 P.M., Treasury agents executed a search warrant at 2031 W. Alexis Road, by entering the rear door and searching the rear area of the apartment building. Tr. at 36, and 149-50.

(18) Immediately upon entering the rear door, Treasury agents ran up a flight of stairs into an upstairs bedroom. In the bedroom were the defendant John Besase, Paul McDonald, John Mercurio and George Stoianoff. Cr. at 970-77; Tr. at 39 and 151.

(19) In the bedroom was a closet, the rear panel of which contained a hidden door that led into a concealed room. Tr. at 39 and 40; Plaintiff's Exhibits 67 and 68.

(20) In that concealed room the Treasury agents found George Besase, Sam Besase, Angelo Perna, Sam Rappaport, Harold Bonta, Richard Kaydis, Thelma Kreitzer and Alice Shively. Cr. at 977; Tr. at 40, and 151.

(21) Harold Bonta made statements to the agents that the apartment belonged to him, and that the numbers slips in the hidden room were also his. Cr. at 1194-95; Tr. at 97-98.

(22) The agents conducted a search of the concealed room behind the hidden panel. In that room, lying about on several tables, were piles of numbers slips and amounts of cash, together with numerous papers, adding machines, adding machine tapes and other paraphernalia commonly associated with a numbers game. Cr. at 599-610; Tr. at 41-44; Plaintiff's Exhibits 71-74.

(23) Seized in the hidden countroom was a small brown notebook, Plaintiff's Exhibit 93. This notebook was lying closed on the table beside an adding machine, and is pictured in Plaintiff's Exhibit 74, a photograph. Enclosed within this notebook at the time of its seizure were several dozen intermingled receipts for various bills, including among others the following:

a. A telephone bill for the residence of Sam Besase at 5519 W. Rowland, Toledo (No. 474-0263). This telephone bill was addressed to Thelma M. Besase, the sister of Sam Besase.

b. A telephone bill for the residence of George Besase, 3916 Greenview, Toledo (No. 474-4833).

c. Telephone bills for the countroom itself, No. 475-7343 (GReenwood 5-7343, previously KLondike 7343). These bills were addressed to Sam Besase, 2031 W. Alexis Road, Toledo.

d. A telephone bill for 1107 Jefferson Street (No. 244-5410), addressed to Paul Little, an alias of Paul McDonald.

e. Telephone bills for 1317 Washington Street (No. 244-3902), addressed to John Mercer, an alias of John Mercurio (Tr. at 89).

f. An electric bill for the residence of Sam Besase, 5519 W. Rowland Avenue, also addressed to Thelma M. Besase, Sam Besase's sister.

g. An electric bill for the residence of George Besase, 3916 Greenview, Toledo.

h. Electric bills addressed to Joseph Besase, 2031 W. Alexis Road, Toledo.

i. Electric bills for 1317 Washington Street, addressed to John Mercer.

j. Electric bills for 143 Eleventh Street, addressed to George Mercurio.

k. A gas bill for the residence of George Besase, 3916 Greenview, Toledo.

l. Gas bills for 1317 Washington Street, addressed to John Mercer.

m. Rent receipts for 1317 Washington Street, made out to "Bessisie & Mercer."

n. Receipts for service to adding machines at 143 Eleventh Street.

These receipts are commonly dated for June, July, August or September, 1963. Tr. at 63-67; Plaintiff's Exhibit 93.

(24) The cash in the concealed room was subsequently seized and counted by the agents, and found to amount to approximately $2,600. Tr. at 44.

(25) In a wall liquor cabinet in the secret countroom, the Treasury agents found three brown paper bags containing numbers slips, which the agents seized and removed. These slips were bound in separate packets within each bag, and many of the numbers slips were dated. The slips in one bag carried the date October 18. The slips in another bag carried the date October 21, and the slips in the third bag carried the date October 22. Those dates would have been the Friday, Monday and Tuesday preceding the Treasury raid. There were several dozen separate

packets of numbers within each bag, and each packet was bound with an adding machine tape, which reflected the total value of the wagers in that packet. Each adding machine tape carried a handwritten code or initial, and each such code or initial was different and distinctive from every other code or initial within the same bag. Frequently there was a single packet in each of the three bags bearing the identical distinctive code or initial. Tr. at 44-55; Plaintiff's Exhibits 70, 52, 53 and 54 (and subparts thereof).

(26) Treasury agents also seized and removed the stacks of slips and adding machine tapes lying about on the tables in the countroom. These slips carried dates indicating that they were written on the day of the raid, Wednesday, October 23, 1963. The tapes carried codes matching those found on the tapes in the brown paper bags. Tr. at 55-58; Plaintiff's Exhibit 55 (and subparts thereof).

(27) Agent Gregory Michael removed a piece of insulation tape from the hidden countroom during the raid. This piece of tape carries the name of Julius Dekany and his 1963 telephone number, 244-8355. Dekany served as accountant to the partnership of George, John and Joseph Besase (Star Company), and to the partnership of Sam Besase and Angelo Perna. Tr. at 161, 162 and 485; Plaintiff's Exhibit 87; Finding of Fact No. 10, *supra*.

(28) One of the tables in the hidden countroom had a telephone in it, pictured in Plaintiff's Exhibit 73, a photograph. The disk on the face of the telephone carried the number KL 7343. Telephone records indicated that the number was actually changed in 1956 to GR 5-7343 (475-7343), and that the number was registered in the name of Sam Besase. Plaintiff's Exhibit 95; Cr. at 1299-1302; Tr. at 61 and 62.

(29) The Treasury agents also found and seized in the liquor cabinet in the hidden countroom a blank federal tax form, Plaintiff's Exhibit 246, addressed to G. & J. Besase; George Besase's wife is Josephine Besase. Tr. at 46, 444; Plaintiff's Exhibit 70.

(30) At the time of the raid, Treasury agents executed warrants for the arrest of defendants Sam Besase, George Besase, John Besase, Angelo Perna and Sam Rappaport. Based on Harold Bonta's assertions that everything found on the premises were his (see Finding of Fact No. 21, *supra*), he was also arrested.

(31) Pursuant to his arrest, defendant Angelo Perna was searched and was found to have a slip of paper bearing the telephone number of defendant Ted Maison. Plaintiff's Exhibit 81g. Cr. 921-27; Plaintiff's Exhibit 102.

(32) Pursuant to his arrest, defendant Sam Rappaport was searched and was found to have on his person the following:

a. The sum of $1,695 in cash.

b. A slip of paper, Plaintiff's Exhibit 78, bearing several telephone numbers, including the phone number for the hidden countroom, GR 5-7343.

c. Another slip of paper, Plaintiff's Exhibit 75, bearing several telephone numbers, including the home phone of George Besase ("GR 4-4853 Red") and the home phone of Sam Besase ("GR 4-0263 SB").

d. Another slip of paper, Plaintiff's Exhibit 76, bearing a series of codes, with apparent telephone instructions as to each (i.e., "call" "will call"). These codes, such as "Hank", "W.G.", "RA", in each instance matched those found on packets of numbers slips seized from the hidden countroom. Tr. at 533.

e. A slip of paper, Plaintiff's Exhibit 77, bearing several telephone numbers, including that of Harold Bonta (CH 4-4057). Plaintiff's Exhibit 100.

f. Another slip of paper, Plaintiff's Exhibit 79, bearing several telephone numbers, including the telephone number of one of the drop points for numbers slips, 1107 Jefferson, CH 4-5410. Cr. 800-05, 903-04.

(33) Agent Gregory Michael searched the automobile of John Mercurio parked at 2031 W. Alexis Road at the time of the raid, and found therein a gas bill addressed to John Mercer for 1317 Washington Street, Plaintiff's Exhibit 88, and a telephone bill addressed to Thelma M. Besase at 5519 W. Rowland, Plaintiff's Exhibit 89, which address was in fact the residence of the defendant Sam Besase. Cr. 993-1000; Tr. at 162 and 163.

(34) Subsequent to the surveillance and search and seizures described above, criminal charges were brought against defendant taxpayers John Besase, Sam Besase, George Besase, Sam Rappaport, Angelo Perna, Ted Maison and others. At the criminal trial in *United States v. Sam Besase, et al.*, CR No. 64-18, begun September 15, 1965, and concluded September 29, 1965, Baxter Long, Norman Blackman, Emanuel Licata, John Spencer, George Frazer, Horace Newton, Bernie Price, Robert L. Smith, Finous Allen, Eddie K. Smith, Charles Miles, Silas A. Means, Elmer Evans and Mary Bilecki testified that he or she accepted numbers wagers ("wrote numbers") in Toledo during 1963. Most also testified that other unnamed persons turned numbers into them. None of these individuals testified that he/she actually booked the wagers themselves, but rather each turned over his/her numbers to other persons. Each testified that he/she received a commission ranging from ten percent (10%) to thirty-five percent

(35%) of the gross wagers they "wrote." Cr. at 257-87, 348-481, 491-591.

(35) Baxter Long, Robert L. Smith, Eddie K. Smith and Horace Newton testified that they turned in their numbers at 143 Eleventh Street to Paul McDonald (alias Little Paul, Tr. at 144) and occasionally to others. Cr. at 259-62, 466-67, 550-53, 501-13. The rear entrance to 143 Eleventh Street is 1107 Jefferson Street, a separate address, but the same building. Plaintiff's Exhibits 61 and 61A; Tr. at 157.

(36) Bernie Price, Charles Miles and Finous Allen testified that they turned in their numbers at an entrance on Pinewood Street to Harold Bonta. Cr. at 491-94; 538-40, 562-64. The Pinewood Street entrance is the rear portion of 1317 Washington Street. Plaintiff's Exhibits 62 and 62A; Tr. at 157.

(37) Elmer Evans and Silas Means testified that they turned in their numbers at a building at the intersection of Eleventh and Washington Streets, i.e., Bauer's Market, to George Stoianoff. Cr. at 568-69, 575-77, 581; Tr. at 157; Plaintiff's Exhibit 63. George Frazer also testified that he turned in his numbers at the corner of Eleventh and Washington Streets, but he could not identify George Stoinoff. Cr. at 453-54.

(38) Emanuel Licata testified that his numbers would be picked up at 444 Woodland Street by either George Stoianoff, Jerry Mercurio or Anthony Besase, Jr., who would come by in a car. Cr. at 360-62.

(39) John Spencer testified that he usually turned his numbers in to John Mercurio, who would meet him in his automobile at the Kroger Store parking lot at Detroit and Monroe Streets. Cr. at 384-85. Spencer further testified that if he was running late with his delivery,

he would telephone GR 5-7343, the number of the phone found in the concealed room at 2031 W. Alexis, see Finding of Fact No. 28, that usually a woman would answer, and he would ask for Sam, and the defendant Sam Besase would come on the line and arrangements would be made for the late delivery of Spencer's numbers. John Spencer could recognize Sam Besase's voice. Cr. 387-89, 445-46; Plaintiff's Exhibits 64 and 64A.

(40) Spencer further testified that when he was late with his numbers slips, he would arrange to take them to the Miracle Mile, a location in Toledo partway between the intersection of Detroit Avenue and Monroe Street and W. Alexis Road. There he would be met by, and would deliver his slips to, John Mercurio or Sam Besase or Sam Rappaport. Rappaport had criticized Spencer for being late in turning in his tickets on such occasions. Cr. 386-87, 394-96.

(41) At the criminal trial, each person listed in Finding of Fact No. 34, *supra*, examined and identified packets of numbers slips seized at 2031 W. Alexis Road during the raid on October 23, 1963, and in each instance identified one or more packets of numbers as those either written by him, or written by others but turned into him, which numbers he himself then turned in with his own to other persons. Baxter Long, Norman Blackman, Emanuel Licata, George Frazer, Horace Newton, Bernie Price, Robert L. Smith, Finous Allen, Charles Miles and Silas Means were able to identify a packet in each of the four separate bundles of slips (Plaintiff's Exhibits 52, 53, 54 and 55) as being his own packet, turned in by him. Long, Blackman, Licata, Frazer, Newton and Price were also able to identify their packets written on each of the four dates, October 18, October 21, October 22 and October 23, 1963. Cr. at 265-67, 354-57, 365-68, 457-59, 468-72, 497-501, 514-17, 541-45, 565-66, 571-73.

(42) The building at 2031 W. Alexis is a five-unit apartment, and prior to 1963, the title to the building was held by Joseph Besase, a brother of George, John and Sam Besase, who died in June, 1963. In January, 1963, Joseph Besase conveyed title to the building to Thelma Kreitzer, the niece of Joseph, George, John and Sam Besase. In 1963, the premises at 2031 W. Alexis were occupied by Alice Shively, a niece of the Besase brothers, Mary Monica, a sister of the Besases, Anthony Besase, Jr., and David Smith, both nephews of the Besase brothers. Tr. at 142, 181-83, 457-58. Sam Besase resided at 2031 W. Alexis until 1957, and had a phone there in his name (No. KL 5-7343). Sam Besase testified that he did not have that number changed when he moved. Tr. at 373-78.

(43) Defendants Sam Besase, Angelo Perna and Sam Rappaport each testified that the apartment at the rear of the premises at 2031 W. Alexis Road, which was raided on October 23, 1963, belonged to Harold Bonta. Tr. at 242, 312, 362. Harold Bonta also claimed ownership of that apartment in his deposition. Bonta Deposition at 12-13.

(44) Defendants Sam Besase, George Besase, Angelo Perna, Sam Rappaport and Ted Maison all testified that they occasionally went by 2031 W. Alexis in the afternoon to play cards, listen to music, or discuss their golf games, and for no other reason.

(45) Defendants Sam Besase, George Besase and Sam Rappaport testified that they were gathered downstairs at the rear of 2031 W. Alexis Road on the afternoon of October 23, 1963, and heard a loud commotion at the door. They further testified that they became frightened, and since there was no other exit, they all ran upstairs and just followed one another into the concealed room, where they were found by the Treasury agents.

(46) Angelo Perna testified that he also was in the recreation room at 2031 W. Alexis on October 23, 1963, at the time of the raid, and upon hearing a loud commotion in the upstairs area, ran upstairs with the other men present to see what was happening. Perna testified that the Treasury agents were already present in the upstairs area when he got up the stairs, Tr. at 250-55, and that he then followed the others into the concealed room. Tr. at 261.

(47) All of the items seized on October 23, 1963, from the concealed room were the subject of a libel action in this Court, *United States of America v. One 1969 Oldsmobile, etc.*, C 64-33, filed February 25, 1964. Defendants' Exhibit 16. Therein the United States, libelant, stated, *inter alia*, that:

> Harold Bonta, 22-15th Street, Toledo, Ohio, allegedly claims an interest in all of the said property [subject to the libel action].

Libel ¶ 3. The United States further alleged that

> Harold Bonta engaged in and carried on the business of accepting wagers and he did willfully attempt to evade and defeat the excise taxes imposed upon such wagers by section 4401, Internal Revenue Code, and he did aid and abet other persons engaged and carrying on such business in the willful attempt to evade and defeat such excise taxes imposed by law, all in violation of section 7201, Internal Revenue Code, and while so engaged, he did use and intend for use in the said violations the aforesaid property.

Libel ¶ 8.

Among the items subject to the libel action were "Miscellaneous Wagering Supplies and Paraphernalia, consisting of 'K' books, numbers tickets, adding machine tapes

and numbers records and materials" seized from the concealed room at 2031 W. Alexis Road.

(48) On March 18, 1964, in response to the request of the United States, this Court, per Judge Frank Kloeb, found that the allegations of the libel were true, and ordered that all of the seized property be forfeited to the Internal Revenue Service and sold, and further ordered that the "Miscellaneous Wagering Paraphernalia shall be destroyed by the United States Marshal." Defendants' Exhibits 27 ¶ 5.

(49) The numbers slips and other gambling paraphernalia were not destroyed by the United States Marshal. Plaintiff's Exhibits 52, 53, 54 and 55 are the numbers slips seized from the concealed room on October 23, 1963. It is on the basis of these slips that the plaintiff has determined the defendants' liability in this action. Tr. at 58-61, 105.

(50) The Treasury agents prepared tabulations of the seized slips, and also totaled up the amounts reflected on the seized adding machine tapes binding each packet. These tabulations were made by Special Agent Robert Hill and by Revenue Agent Walter Roberts, and their totals for each of the four separate dates are as follows:

Date	Plaintiff's Exhibit No.	Totals Per Seized Tapes	Totals Per Seized Slips
October 18	52	$7,176.74	$6,879.28
October 21	53	$7,212.26	$6,288.28
October 22	54	$5,966.02	$5,612.69
October 23	55	$6,146.64	$6,121.96

Tr. at 58-61; Plaintiff's Exhibits 222 through 225.

(51) Based upon the seized adding machine tapes, the Internal Revenue Service determined that the average daily receipts for the numbers operation were $6,625.41. Tr. at 105.

Discussion

A. Evidentiary Questions

Several significant evidentiary questions arose at trial which require the Court's attention before the merits of the case may be addressed.

The first question involves the admissibility of the Plaintiff's Exhibits 201 and 205, which are the Certificates of Assessment issued against the defendant taxpayers. See Findings of Fact Nos. 1 and 2. Defendants object to the admissibility of said exhibits on the grounds that the government failed to prove that the assessment was personally approved by Director Melvin Burton, District Director, Cleveland, Ohio, on April 17, 1964. The Court finds this argument to be without merit.

Plaintiff has offered into evidence the Recommendation for Jeopardy Assessment which formed the basis for the assessments against the defendant taxpayers. See Plaintiff's Exhibits 203 and 207. Both documents bear the signature of Melvin J. Burton, District Director of the Cleveland Office of the Internal Revenue Service. Defendants have come forward with no evidence whatsoever to put the authenticity of Burton's signature into question. *Contrast Thorton v. United States*, 73-1 USTC 9232, *rev'd on other grounds*, 493 F.2d 164 (3d Cir. 1974). Accordingly, the Court must presume from Burton's signature that Burton did in fact satisfy his legal duty of personally approving all jeopardy assessments, and will admit Plaintiff's Exhibits 203 and 207 into evidence over the defendants' objections.

See generally 9 *Wigmore on Evidence* 6 2534 (3d ed. 1940); *McCormick, Law of Evidence* § 309 (1954).

Defendant taxpayers have also objected to the admission into evidence of Plaintiff's Exhibits 52, 53, 54 and 55, which are the numbers slips seized by Treasury agents from the concealed room at 2031 W. Alexis during the raid of October 23, 1963. See Findings of Fact Nos. 25 and 26. Defendants base their objection on two theories. They first claim that the government's libel action of February 25, 1964, stated Harold Bonta to be the owner of the numbers slips, and argue that the government is therefore estopped from now asserting that the slips belonged to the defendant taxpayers. Defendants further contend that since this Court ordered the slips destroyed in its *Judgment* of March 18, 1964, said slips should now be excluded for the reason that "equity considers done which should have been done."

Although the Court is likewise troubled by the seemingly inconsistent positions taken by the government regarding the ownership of the numbers slips seized from 2031 W. Alexis, it does not find the defendants' arguments persuasive. First of all, the government's libel petition does not allege that the government believed Harold Bonta to be the exclusive owner of the slips, but rather states that Bonta "*allegedly* claims an interest" in the property. See Finding of Fact No. 47. Moreover, in order to assert the doctrine of equitable preclusion against the admission of the slips the defendant taxpayers are required to show that they have altered their positions in reliance upon the allegations of the government in the libel petition, and no such reliance has been demonstrated in the instant case. *See generally* 1B Moore's *Federal Practice* § 0.405 (2d ed. 1976). The Court has also concluded that none of the principals underlying the exclusionary rule applied

in the federal courts require exclusion of the disputed exhibits. *See generally United States v. Janis*, 428 U.S. 433 (1976). Therefore, Plaintiff's Exhibits 52, 53, 54 and 55 will also be admitted into evidence over defendants' objection.

B. Burden of Proof

It is now well established that an assessment for unpaid taxes made by the Internal Revenue Service is presumed to be correct. Accordingly, the plaintiff argues that by the admission into evidence of the Certificates of Assessment issued against the defendant taxpayers on April 17, 1964, they have established a *prima facie* case. Plaintiff further contends that both the burden of going forward and the burden of ultimate persuasion by a preponderance of the evidence are therefore on the defendant taxpayers in this case. The Court does not agree with the latter contention.

Although the Court recognizes that there is authority to the contrary,[3] it is of the opinion that where the taxpayer is required to prove a negative, i.e., the absence of income, or as in this case, the non-existence of a partnership, it would be inequitable to place the burden of ultimate persuasion by a preponderance of the evidence upon the taxpayer. *See Weir v. Comm'r of Internal Revenue*, 283 F.2d 675 (6th Cir. 1960); *Haimowitz v. Comm'r of Internal Revenue*, 30 TCM 1034 (1971). To hold otherwise would make it virtually impossible for a taxpayer to obtain a favorable decision. *See generally United States v. Janis*, 428 U.S. 433, 440-443 (1976).

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3. *Compare United States v. Rexach*, 482 F.2d 10 (1st Cir. 1973), *cert. denied*, 414 U.S. 1039 (1973); *United States v. Lease*, 346 F.2d 696 (2d Cir. 1965). *Cf. United States v. Dean*, 519 F.2d 624 (6th Cir. 1975).

Accordingly, this Court will adopt the statement of law set forth by the United States Court of Appeals in *Foster v. Comm'r of Internal Revenue,* 391 F.2d 727 (4th Cir. 1968):

> The burden of proof is on the Commissioner to show that the taxpayer received income. This burden is initially satisfied, however, by the fact that the Commissioner's deficiency determination is presumed correct. The burden is thus on the taxpayer to prove the incorrectness of the deficiency determination. This burden is procedural and is met if the taxpayer produces competent and relevant evidence from which it could be found that he did not receive the income alleged in the deficiency notice. In other words, the taxpayer at this point has the burden of producing evidence or going forward with the evidence. If this burden is met, the burden shifts back to the Commissioner to prove the existence and amount of the deficiency (footnotes omitted).

391 F.2d at 735. *See also Baird v. Comm'r of Internal Revenue,* 438 F.2d 490 (3d Cir. 1970); *Herbert v. Comm'r of Internal Revenue,* 377 F.2d 65 (9th Cir. 1966); *Weir v. Comm'r of Internal Revenue,* 283 F.2d 675 (6th Cir. 1960). *See generally Bar L. Ranch, Inc. v. Phinney,* 426 F.2d 995 (5th Cir. 1970).

C. Analysis

In the instant case, six of the seven defendant taxpayers took the stand and unequivocally denied participation in a common numbers operation. Each admitted operating in the numbers business during the relevant time period, but testified that they conducted their own business in two- or three-man partnerships separate and apart from the numbers business in operation at 2031 W. Alexis.

The tax returns of each of the respective, separate partnerships are in evidence in this case. The defendant taxpayers further testified that they gathered periodically at 2031 W. Alexis to socialize and play cards while waiting for the daily numbers to come out, and not for the purpose of carrying on a common enterprise.

Based upon the defendant taxpayers' common denial of any participation in a seven-man partnership as alleged by the plaintiff, and based upon the defendants' credible explanation of their periodic visits to 2031 W. Alexis, and of their presence there on the date of the raid conducted October 23, 1963, the Court finds that the defendant taxpayers have carried their burden of refuting by a preponderance of the credible evidence the presumption of correctness attached to plaintiff's tax assessments. The Court further finds that the plaintiff has failed to refute the credible testimony of the defendants. Accordingly, the Court will enter judgment in favor of the defendant taxpayers, and need not consider further the additional claims or counterclaims raised in this action.

For the reasons set forth above, the Court hereby makes the following Conclusions of Law:

Conclusions of Law

(1) This Court has jurisdiction over this action pursuant to the provisions of 28 U.S.C. §§ 1340 and 1345, and 26 U.S.C. §§ 7402 and 7403.

(2) The defendant taxpayers have met their burden of refuting, by a preponderance of the credible evidence, the presumption of correctness attached to plaintiff's tax assessment.

(3) The plaintiff has failed to produce sufficient evidence to rebut the credible testimony of the defendant

taxpayers or to otherwise establish the existence of the alleged seven-man or six-man partnership.

It is therefore

ORDERED that the plaintiff United States of America take nothing, that the action be dismissed on the merits, and that the defendant taxpayers John Besase, George Besase, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison recover of the plaintiff United States of America their costs of action.

/s/ NICHOLAS J. WALINSKI
United States District Judge

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed August 30, 1977)

Civil Action File No. 71-58

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

UNITED STATES OF AMERICA,

VS.

JOHN BESASE, et al.

JUDGMENT

This action came on for trial before the Court, Honorable Nicholas J. Walinski, United States District Judge, presiding and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff United States of America take nothing, that the action be dismissed on the merits, and that the defendant taxpayers, John Besase, George Besase, Sam Besase, Angelo Perna, Sam Rappaport and Ted Maison recover of the plaintiff United States of America their costs of action.

/s/ NICHOLAS J. WALINSKI
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed July 25, 1980)

No. 78-3047

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOHN BESASE, GEORGE BESASE, SAM BESASE, ANGELO PERNA, SAM RAPPAPORT, TED MAISON,
Defendants-Appellees.

ORDER DENYING PETITION FOR REHEARING

Before: CLELBREZZE, MERRITT and JONES, *Circuit Judges.*

Upon consideration of the petition for rehearing filed by the defendants-appellees, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

Based on our review of the record including the motion to add an addendum, it is ORDERED that the petition for rehearing be and it hereby is denied.

Entered by Order of the Court
/s/ JOHN P. HEHMAN
Clerk

THE CONSTITUTION OF THE UNITED STATES

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE

26 U.S.C. Section 4401

IMPOSITION OF TAX

Sec. 4401 [1954 Code]. (a) WAGERS.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) AMOUNT OF WAGER.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) PERSONS LIABLE FOR TAX.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

26 U.S.C. Section 7401

SEC. 7401. AUTHORIZATION.

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

Source: Sec. 3740 (in part), 1939 Code, substantially unchanged.

26 U.S.C. Section 7402(a)

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) TO ISSUE ORDERS, PROCESSES, AND JUDGMENTS.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the

enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

26 U.S.C. Section 7403(a)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) FILING.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

Supreme Court, U. S.
FILED
NOV 19 1980
MICHAEL RODAK, JR., CLERK

No. 80-615

In the Supreme Court of the United States

OCTOBER TERM, 1980

SAM BESASE, SAM RAPPAPORT AND TED MAISON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-615

SAM BESASE, SAM RAPPAPORT AND TED MAISON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the judgment of the court of appeals upholding wagering tax assessments and penalties against them in the amount of $1,047,553.78.

The pertinent facts may be summarized as follows: On October 23, 1963, after several days of surveillance, agents of the Internal Revenue Service, pursuant to a search warrant, conducted a raid on an apartment at 2301 West Alexis Road, Toledo, Ohio. During the raid, they found a concealed room that contained stacks of betting (numbers) slips and other gambling paraphernalia. They also found petitioners Besase and Rappaport there, and numbers slips that were identified as having been written by a third person and delivered to petitioner Maison, who

had been observed on the premises prior to the raid (Pet. App. A7-A10). Based upon the records seized during this raid, the Internal Revenue Service issued assessments for wagering taxes, plus penalties and interest against each petitioner and four other individuals believed to be connected with the Alexis Road gambling operations[1] (Pet. App. A3, A11).

Subsequently, the government brought this action in the United States District Court for the Northern District of Ohio to reduce these assessments to judgments. At trial, petitioners (and the four other individuals) denied any involvement in the numbers operation.[2] They explained that their presence in the apartment was purely for social purposes (Pet. App. A8).

The district court held that petitioners and the other individuals against whom assessments were made "have carried their burden of refuting by a preponderance of the credible evidence the presumption of correctness attached to * * * [the] assessments" (Pet. App. A36). The court also found that the government "has failed to refute the credible testimony of" petitioners and others (*ibid.*) and therefore judgment was entered against the government (Pet. App. A38).

The court of appeals reversed as to petitioners. As it stated, "Sam Besase was found in the countroom at the time of the raid" (Pet. App. A9). Moreover, the countroom telephone was still in his name, and he was

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[1] The assessments were based on the theory that all seven individuals were associated with the Alexis Road operation, which was assumed to be either a partnership or some other type of joint venture.

[2] Petitioners admit that during the pertinent period they were engaged in wagering. They maintained, however, that their wagering operations were separate from the Alexis Road operation.

identified as someone who would receive numbers slips and speak on the telephone to transact countroom business (*ibid.*). Likewise, IRS agents observed Ted Maison entering and leaving the building, and numbers slips were identified as having been written for him (Pet. App. A10). Similar evidence linked Sam Rappaport to the gambling enterprise (*ibid.*). In these circumstances, the court of appeals correctly found that "the evidence clearly ties [all three petitioners] to the * * * [Alexis Road] operation"[3] (Pet. App. A9).

1. Petitioners contend (Pet. 12) that because the government's original theory in assessing the tax liability was predicated upon the existence of a six or seven member partnership and the government failed to establish the existence of such a partnership, the assessments cannot be sustained. However, the court of appeals found that the government had established that petitioners were operating the lottery. This is sufficient to establish petitioners' liabilities for the unpaid excise taxes as members in a partnership or joint venture. Whether such an enterprise was conducted by three or six persons was immaterial because the liability of partners for the unpaid obligations of such an operation is joint and several. Nothing in the opinion of the court of appeals reflects a finding that the three petitioners were conducting separate gambling businesses, as individuals, at the Alexis Road address. To the contrary, the court of appeals analyzed the evidence with respect to each petitioner (Pet. App. A9-A10) and concluded that it tied each of them to the "countroom operation" and established them as members of a common enterprise conducted in the Alexis Road "countroom."

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[3] The court of appeals affirmed the judgment in favor of the four other individuals (Pet. App. A10).

2. Petitioners also argue (Pet. 10-11) that the record does not support the court of appeals' ruling that they were involved in the Alexis Road operation. But as we have pointed out (*supra*, pages 2-3), the court of appeals carefully analyzed the evidence and was amply justified in concluding otherwise. This fact-bound determination does not warrant review by this Court.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4]Petitioners explained that their presence at the Alexis Road premises, either prior to or during the raid, was for social purposes. However, petitioners failed to explain other evidence that, as the court of appeals noted (Pet. App. A9), "clearly ties them to the countroom [Alexis Road] operation." As the court pointed out (Pet. App. A9-A10), seized numbers slips were identified as being written for petitioners. Petitioners contend (Pet. 11) that the court of appeals erred in stating that some of the seized slips had been written and turned in to petitioner Maison by Mary Bilecki. There is no dispute, however, that Bilecki wrote numbers for both Maison and Rappaport, who were admittedly partners (Pet. App. A19), and that she identified some of the seized slips as being written by her. While she testified that the seized slips were delivered to a person called "Bob," she could not identify "Bob" and no one present at the time of the raid had that name. Moreover, there was other evidence that connected petitioners to the Alexis Road operation (Pet. App. A23-A29). Although petitioners' testimony could be viewed as providing some minimal support for the result reached by the district court, the court of appeals was amply justified in reaching the opposite conclusion. "[T]he reviewing court on the entire evidence * * * [was] left with the definite and firm conviction that a mistake has been committed." Compare *United States* v. *Gypsum Co.*, 333 U.S. 364, 395 (1948).